Supreme Court, U.S.
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No. 93-1256

In The

Supreme Court of the United States

October Term, 1993

J. WILLIAM HAYDEN,

Petitioner,

v.

LA-Z-BOY CHAIR CO.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Court of Appeals correctly hold that petitioner, who was the sole stockholder and full-time employee of his own corporation, which in turn was an independent contractor to respondent La-Z-Boy Chair Company, was not covered by the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA")?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. A1-A12) is reported at 9 F.3d 617. The opinion of the United States District Court for the Northern District of Indiana (*id.* at B1-B11) is unreported.

STATUTE

The Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, provides:

> It shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise *discriminate against any individual with respect to his* compensation, terms, conditions, or privileges of *employment, because of such individual's age.*

29 U.S.C. § 623(a)(1) (emphasis added.)

STATEMENT OF THE CASE

A. Facts

Although petitioner J. William Hayden ("Hayden") asserts that "an artificial label – independent contractor – . . . has been attached to him," Petition at 11, the record shows that he unequivocally conceded his independent contractor status below. Indeed, for many years, he took advantage of this status to reduce his tax liability, and even interposed his own wholly-owned corporation between himself and respondent La-Z-Boy Chair Company ("La-Z-Boy").[1]

Hayden became a commissioned "independent sales representative" for La-Z-Boy, a furniture manufacturer, in 1968. Starting in the 1970s, Hayden and La-Z-Boy entered into a series of written one-year "Independent Sales Representative Agreements." Each Agreement provided that the representative was "not an employee or agent" of La-

[1] La-Z-Boy Chair Company is a Michigan corporation with no parent companies, subsidiaries or affiliates except wholly-owned subsidiaries.

Z-Boy, and that either party could terminate the relationship upon 30 days' notice, with or without cause.

La-Z-Boy had no requirement about the form Hayden's business as an independent sales representative should take. In December 1984, Hayden incorporated "J. William Hayden, Inc.", an Indiana corporation in which he was the sole stockholder, and asked La-Z-Boy to contract with that corporation. La-Z-Boy complied, and in 1985 through 1990, the parties executed written Independent Sales Representative Agreements identifying the parties as La-Z-Boy and J. William Hayden, Inc.

La-Z-Boy paid Hayden a straight commission, and from 1985 forward, paid all commissions to J. William Hayden, Inc. La-Z-Boy did not provide Hayden with an office, reimburse him or his corporation for any business expenses, or provide Hayden with any benefits. La-Z-Boy did not withhold any taxes or social security payments on the commission payments it made to Hayden or his corporation. Nor did La-Z-Boy tell Hayden when to call on customers, require him to submit call reports, or otherwise manage the day-to-day operation of his business.

Hayden testified in deposition that his purpose for incorporating J. William Hayden, Inc. was to reduce his tax liability. After its creation, the corporation received all commission payments from La-Z-Boy and paid Hayden "wages".[2] Hayden was the corporation's only full-time

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[2] Hayden filed tax returns as a self-employed person from the time he became a La-Z-Boy representative until the time he incorporated. From 1985 through 1990, he filed both a corporate tax return and an individual tax return showing himself to be an

employee, although it occasionally hired a part-time secretary and bookkeeper and in one or two years paid Mrs. Hayden for unspecified services. J. William Hayden, Inc. funded Hayden's retirement plan, paid for his insurance, retained and paid accountants and attorneys, and paid all of Hayden's telephone, travel, and entertainment expenses.

La-Z-Boy placed Hayden on six-month periods of probation in 1980, 1986, and 1990. In December 1990, it decided not to renew the Independent Sales Representative Agreement because of long-term concerns over Hayden's slow sales growth, poor dealer relations, poor results in sleeper, sofa and recliner sofa sales, and missed opportunities for developing additional business with his accounts. See Pet. App. at A3 n.1.

Hayden then applied for unemployment compensation benefits from the State of Indiana, certifying that he was an employee of J. William Hayden, Inc. He received the requested benefits for twenty-six weeks. Hayden never made any unemployment compensation claim asserting that he was an employee of La-Z-Boy Chair Company.

B. Proceedings Below

In his complaint, petitioner, an individual, alleged that La-Z-Boy violated ADEA when it decided not to

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officer and employee of J. William Hayden, Inc. Hayden's personal tax returns reflect that his "wages" were paid by his corporation. Hayden has never filed a tax return showing himself to be an employee of La-Z-Boy Chair Company.

renew the Independent Sales Representative Agreement between La-Z-Boy and J. William Hayden, Inc.

Following the completion of discovery, the district court granted summary judgment dismissing Hayden's ADEA claim on two grounds. First, the district court concluded that Hayden, who conceded that he was not an "employee" of La-Z-Boy, was not covered by ADEA. Pet. App. at B7. Second, the district court held that "Hayden's proffered evidence of age discrimination fails to create a genuine issue of material fact." Pet. App. at B7-B8.[3]

The Court of Appeals affirmed. Hayden acknowledged, and the Court of Appeals noted, the line of cases holding that ADEA applies only to employees and applicants for employment, and does not apply to independent contractors. See Pet. App. at A4-A6. Hayden sought to distinguish these cases, relying on cases applying Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), "where an employer 'discriminatorily interferes with an individual's employment opportunities with *another* employer.' " Pet. App. at A6, quoting *Doe* v. *St. Joseph's Hospital of Fort Wayne*, 765 F.2d 411, 423 (7th Cir. 1986), and *Sibley Memorial Hospital* v. *Wilson*, 488 F.2d 1338, 1341 (D.C. Cir. 1973) (emphasis added). The only "employment" Hayden identified, however, was with his

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[3] In addition to the ADEA claim, Hayden also alleged pendent state law claims of tortious interference with business relations, tortious interference with prospective advantage, and intentional infliction of mental and emotional suffering. After dismissing Hayden's ADEA claim, the district court declined to exercise pendent jurisdiction.

own corporation, of which he was the sole stockholder and sole full-time employee. See Pet. App. at A4-A6, B7.

The Court of Appeals found it unnecessary to decide whether ADEA would apply if a defendant "employer" discriminatorily interfered with a plaintiff's employment with a third party. Instead, it agreed with the district court and the Ninth Circuit in *Mitchell* v. *Frank R. Howard Memorial Hospital*, 853 F.2d 762 (9th Cir. 1988), *cert. denied*, 489 U.S. 1013 (1989), that a defendant's alleged interference with plaintiff's "employment" by his own wholly-owned corporation is not protected by either ADEA or Title VII. Pet. App. at A5-A9.

Finally, the Court of Appeals held that Hayden had failed to preserve any argument that he had "indirect employment" relationships with either La-Z-Boy or the furniture dealers on whom he called – indeed he "specifically disavowed making any arguments to the district court on the basis of [any] alleged 'indirect employment' relationships," Pet. App. at A9-A10. The court further concluded, however, that even if these arguments had been preserved, they were without merit. *Id.* at A9-A12.[4]

ARGUMENT

Petitioner asks this Court to grant review in order to hold that ADEA applies whenever a statutory

[4] The Court of Appeals did not reach the district court's alternative holding that Hayden had failed to create a genuine issue of material fact on the issue of age discrimination. Pet. App. at A3.

"employer" takes an action which has an impact on the "compensation" of any "individual," regardless of whether that individual has an "employment" relationship with anyone. This argument was not preserved below. Rather, petitioner argued that he was covered by ADEA because La-Z-Boy's nonrenewal of the Independent Sales Representative Agreement allegedly interfered with his "employment" by his own wholly-owned corporation.

Even if petitioner's argument had been preserved, however, it could be adopted only by ignoring legislative history and overruling an unbroken line of decisions. Directly in point, in *E.E.O.C.* v. *Zippo Manufacturing Co.*, 713 F.2d 32 (3rd Cir. 1983), the Third Circuit held that Zippo's district sales managers, some of whom were incorporated and some of whom were not, were independent contractors and therefore excluded from the scope of ADEA. The court reasoned:

> [T]he legislative history of [ADEA], 1967 U.S. Code Cong. & Ad. News 2214-27, evinces the clear intent to prohibit "age discrimination by employers against employees and applicants for employment." *Levine* v. *Fairleigh Dickinson University*, 646 F.2d 825, 828 (3d Cir. 1981). Therefore, *if appellants were not Zippo employees, ADEA is not applicable to their cause* and their allegation that Zippo violated ADEA in terminating them because they reached the age of 65 must be rejected.

713 F.2d at 35 (emphasis added).

In *Garrett* v. *Phillips Mills, Inc.*, 721 F.2d 979 (4th Cir. 1983), the Fourth Circuit rejected an ADEA claim asserted

by an independent sales representative because "[a] plain reading of the ADEA indicates that an 'individual' only has a cause of action under this provision if he is an 'employee' at the time of his termination." 721 F.2d at 980.

In *Hickey* v. *Arkla Industries, Inc.*, 699 F.2d 748 (5th Cir. 1983), the plaintiff established a corporation, "Perry Hickey Enterprises" as the vehicle for his sales of Arkla products.[5] The Fifth Circuit concluded that he was not covered by ADEA:

> There is no legislative history to support Hickey's contention that employee status is not required for coverage under the ADEA. Moreover, his argument defies a plain reading of the statute. Whether it would be desirable to include independent contractors within ADEA coverage is clearly a matter for Congress, and emphatically not for the courts, to decide.

699 F.2d at 753 (emphasis added). In accord are *Oestman* v. *National Farmers Union Insurance Co.*, 958 F.2d 303 (10th Cir. 1992) (insurance agent was independent contractor not covered by ADEA); *Frishberg* v. *Esprit De Corp.*, 778 F. Supp. 793 (S.D.N.Y. 1991), *aff'd mem.*, 969 F.2d 1942 (2d Cir. 1992) (self-incorporated sales representative was an independent contractor and not an employee protected under ADEA); *Carney* v. *Dexter Shoe Co.*, 701 F. Supp. 1093 (D.N.J. 1988) (sales representative); *Dake* v. *Mutual of Omaha Ins. Co.*, 600 F. Supp. 63 (N.D. Ohio 1984) (insurance agent). Also see *Fountain* v. *Metcalf, Zimak Co., P.A.*,

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[5] See *Hickey* v. *Arkla Industries, Inc.*, 688 F.2d 1009 (5th Cir. 1982), *vacated*, 699 F.2d 748 (5th Cir. 1983).

925 F.2d 1398 (11th Cir. 1991) (partner in accounting firm not covered by ADEA).

Hayden conceded below that an ADEA plaintiff must have some relevant "employment" relationship, but relied on Title VII cases holding that an "employer" may be liable for discriminatorily interfering with the plaintiff's "employment" with a third party. The Court of Appeals did not resolve this issue. Assuming without deciding that an "employer" could be liable under ADEA for interfering with the plaintiff's employment with a third party, the Court of Appeals correctly held that the relationship between an individual and his wholly-owned corporation is not "employment" protected by either statute. Pet. App. at A6-A10. *Mitchell* v. *Frank R. Howard Memorial Hospital*, 853 F.2d 762 (9th Cir. 1988), *cert. denied*, 489 U.S. 1013 (1989), is squarely on point. In *Mitchell*, a radiologist asserted a Title VII claim against a hospital which terminated an exclusive contract with his professional corporation. The Ninth Circuit held:

> Dr. Mitchell argues that the Hospital interfered with his employment relationship with the professional corporation of which he is the sole shareholder. We reject this argument because we believe that the relationship between an individual and his wholly owned professional corporation is not an employment relationship that Congress intended to protect under Title VII.

853 F.2d at 762, quoted in Pet. App. at A8-A9.

The Ninth Circuit in *Mitchell* distinguished one of its own earlier decisions, *Gomez* v. *Alexian Brothers Hospital of*

San Jose, 698 F.2d 1019 (9th Cir. 1983),[6] upon which Hayden strongly relies. The distinction is directly relevant to this case:

> *Gomez* . . . , upon which Dr. Mitchell relies, is clearly distinguishable. *Gomez* involved a corporation that employed a number of doctors who rendered medical services as part of the corporation's group medical practice. *Id.* at 1020. In contrast, Dr. Mitchell is both the sole shareholder and the sole employee of his professional corporation.

Mitchell, 853 F.2d at 762.

As the Court of Appeals concluded, the other Title VII cases on which Hayden relies are distinguishable on the same basis. See, *e.g.*, *Pardazi* v. *Cullman Medical Center*, 838 F.2d 1155 (11th Cir. 1988) (interference with plaintiff's prospective employment by a professional corporation in which another physician was the principal); *Amarnare* v. *Merrill Lynch, Pierce Fenner & Smith, Inc.*, 611 F. Supp. 344 (S.D.N.Y. 1984) (interference with plaintiff's employment with a third party). The patients by which the plaintiff private-duty nurse in *Sibley* and physician in *Doe* were

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[6] The majority of the courts that have considered the issue, unlike Gomez, hold that Title VII has no application to individuals who are not employees of the "employer." Cases are collected in SCHLEI & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 387 & n.52 (2d ed. Supp., ABA Sect. of Labor & Empl. Law, 1989). Also see *Hishon* v. *King & Spaulding*, 467 U.S. 69 (1984) (Powell, J., concurring) (relationship between law partners not an employment relationship within meaning of Title VII); *Wheeler* v. *Main Hurdman*, 825 F.2d 257 (10th Cir.), cert. denied, 484 U.S. 986 (1987) (partner in accounting firm not an employee and not covered by Title VII, the Equal Pay Act, or ADEA).

allegedly employed were likewise third parties, not corporations owned by the plaintiffs.

As the Court of Appeals correctly held:

> We agree with the Ninth Circuit that Title VII does not protect an individual's "employment relationship" with his wholly owned corporation. To hold otherwise would mean that an independent contractor with no relevant employment relationships with the defendant (or anyone else) could bring himself within the protection of the ADEA simply by incorporating.

Pet. App. at A9. Like *Mitchell*, the other cases directly on point, *Zippo*, *Hickey*, and *Frishberg*, hold that a plaintiff cannot bring himself within ADEA simply by incorporating. Also see *Fountain*, 925 F.2d 1398 (partner in accounting firm, as part owner, not covered by ADEA); *Wheeler* v. *Main Hurdman*, 825 F.2d 257 (10th Cir.), *cert. denied*, 484 U.S. 986 (1987) (partner in accounting firm not covered by ADEA, Title VII, or Equal Pay Act).

Finally, Hayden again attempts to resurrect the argument that he had an "indirect employment" relationship with either La-Z-Boy or the furniture dealers on which he called. Petition at 11. The Court of Appeals correctly held that Hayden failed to preserve any "indirect employment" argument, Pet. App. at A9-A10, and that in any event this argument is without merit. *Id.* at A10-A12. For example, the facts in *Zippo* bear a striking resemblance to the facts of this case. 713 F.2d at 35. The *Zippo* court, applying the "hybrid 'right to control/economic realities' test applied in Title VII cases," held that the district

managers were independent contractors as a matter of law. 713 F.2d at 37. In accord are *Eyerman* v. *Mary Kay Cosmetics*, 967 F.2d 213, 218 (6th Cir. 1992) (dismissing a handicap discrimination claim[7] because commissioned national sales director was an independent contractor); *Hickey*, 699 F.2d at 748 (self-incorporated sales representative was independent contractor).[8]

Nor (even if it had been preserved) would Hayden's theory that La-Z-Boy interfered with his relationship with furniture dealers bring him within ADEA. The "interference" is simply refusal to allow Hayden to sell La-Z-Boy products. As the Court of Appeals noted, "Hayden conceded in his deposition that he had no actual or prospective contractual relationship with these furniture dealers and that he remains free to sell these same dealers any (non-La-Z-Boy) furniture or other products." Pet. App. at A12. In *Mitchell*, the Ninth Circuit rejected a Title VII plaintiff's virtually identical claim, holding that the "traditional physician/patient relationship is not one of employer/employee." 853 F.2d at 767. In accord is *Beverly* v. *Douglas*, 591 F. Supp. 1321, 1328 (S.D.N.Y. 1984). The

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[7] Eyerman's claim was brought under Ohio Rev. Code § 4112.02, which contains language similar to Title VII. See 967 F.2d at 217.

[8] *Mitchell* v. *Tenney*, 650 F. Supp. 703 (N.D. Ill. 1986), cited by Hayden, is readily distinguishable from the present case because the defendant, among other things, provided the plaintiff with medical insurance and a place of business and closely regulated his working hours. See Pet. App. at A11-A12.

Court of Appeals correctly rejected Hayden's argument, and its ruling need not be further reviewed.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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